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INTERNATIONAL AVIATION SAFETY: AN EXAMINATION OF THE U.S., EU, AND THE DEVELOPING WORLD

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ON AUGUST 6, 2005, an ATR 72-200 ran out of fuel and crashed in the sea off of Palermo, Sicily.¹ Seventeen people died.² On August 14, 2005, a Boeing 737-300 crashed in the hills northeast of Athens as a result of the plane failing to pressurize.³ Of the six crew members and 115 passengers on board, there were no survivors.⁴ On August 16, 2005, a Boeing MD-82 crashed near Machiques, Venezuela due to engine failure.⁵ All 160 people onboard died in the crash.⁶ These accidents and the dozens of others throughout 2005 largely involved small airlines operating from countries with limited safety controls.⁷ The crashes signaled to the European community and other governments a need for continued efforts to increase aviation safety.⁸

The European Union ("EU") and the United States have two of the strongest and most progressive aviation safety control programs in the world. The key difference to their approaches is the overall control both governments can exert over the operation of the airline industry within their borders. The United

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¹ *Safety Review: Accidents/Incidents in 2005*, FLIGHT INT'L, Jan. 10 – Jan. 16, 2006, at 33.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*; see Commission of the European Communities, *Extending the Tasks of the European Aviation Safety Agency: An Agenda for 2010*, at 2, COM (2005) 578 final (Nov. 15, 2005) [hereinafter *Agenda for 2010*].

⁸ *Id.*

States has greater control over the operations of air carriers within the country than the EU has over its territory.⁹ The EU has struggled to create an aviation authority that can effectively manage the operations of all twenty-five member countries and that can work with the individual national civil aviation authorities of each country.¹⁰

This article explores how the EU and the United States approach the operations of airlines through legislation, their administrative agencies, and most importantly how they intend to face the future of a growing global market and increased air travel. Section I explores the U.S. governance of aviation through federal law, administrative agency law, and state laws. Section II looks at the European Union's approach to controlling aviation among the various Member States by the European Aviation Safety Agency as well as the work of the individual Member States' civil aviation authorities using the United Kingdom's Civil Aviation Authority as an example. Section III examines independent international organizations that attempt to improve aviation safety standards worldwide. Lastly, section IV addresses the issues that face world aviation travel in the near future, looks at the countries currently experiencing the most problems, and discusses the efforts the United States, EU, and international organizations have made to aide in the development of strong aviation safety in developing countries.

I. THE U.S. APPROACH TO DOMESTIC AND INTERNATIONAL AVIATION THROUGH THE FAA, THE NTSB, AND STATE LAWS

The United States has one central regulatory agency for promulgating aviation guidelines, the Federal Aviation Administration ("FAA"), as well as other federal and state level associations for providing additional regulations.¹¹ Congress established the FAA and empowered it to create regulations for governing aviation throughout the United States, leaving the states with control only over issues affecting aviation in areas

⁹ See generally 49 U.S.C. § 41713 (2000); Commission Regulation 1592/2002, Common Rules In The Field Of Civil Aviation And Establishing A European Aviation Safety Agency, 2002 O.J. (L240/1) (EC) [hereinafter Commission Regulation].

¹⁰ See generally *EU Proposes Common Aviation Authority*, AERO SAFETY & MAINT., July 10, 1998, at 3 [hereinafter *Aviation Authority*].

¹¹ See Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (1958).

that the FAA does not choose to or have power to regulate.¹² With the support of the National Transportation Safety Board and state aviation authorities, the FAA accomplishes its purpose of providing a well-ordered and safe aviation system in the United States.¹³

A. HISTORY OF AVIATION REGULATION AND THE ADVENT OF
THE FEDERAL AVIATION ACT

On February 7, 1925, the United States passed its first piece of legislation regarding aviation called the Air Mail Act of 1925, also known as the Kelly Act.¹⁴ The Kelly Act provided for the transportation of mail from the Post Office through various individual air carriers.¹⁵ A year later on May 20, 1926, the United States passed the Air Commerce Act ("1926 Act") for promoting the development of the aviation industry and ensuring safety in flight.¹⁶ At the time of its passage, commercial aviation was a fledgling industry with a relatively poor safety record.¹⁷ The 1926 Act charged the Secretary of Commerce to "foster air commerce; designate and establish airways; establish, operate, and maintain aids to air navigation (but not airports); arrange for research and development to improve such aids; license pilots; issue airworthiness certificates for aircraft and major aircraft components; and investigate accidents."¹⁸ Both the Kelly Act and the 1926 Act marked the beginning of the regulation of an industry that would grow to a value of \$904 billion, or roughly

¹² See 49 U.S.C. § 41713.

¹³ See generally *The Conundrum Of American Airlines Flight 587*, AIR SAFETY WK., Jan. 31, 2005, available at http://findarticles.com/p/articles/mi_mOUBT/is_4_19/ai_n9476425 (illustrating the work between the NTSB and the FAA in determining the cause of a plane crash and the alerts the NTSB provided the FAA with regards to industry-wide deficiencies in pilot training); *Improvements Urged in General Aviation Trend Data*, AIR SAFETY WK., May 16, 2005, available at http://www.findarticles.com/p/articles/mi_mOUBT/is_2005_May_16/ai_n13829931 (demonstrating the FAA's provision of accident information for the NTSB aviation accident report).

¹⁴ FED. AVIATION ADMIN., FAA HISTORICAL CHRONOLOGY, 1926—1996 (1998), http://www.faa.gov/about/history/chronolog_history/ [hereinafter FAA HISTORICAL CHRONOLOGY, 1926 – 1996].

¹⁵ *Id.*

¹⁶ See Air Commerce Act of 1926, Pub. L. No. 69-254, 44 Stat. 568 (1926); 132 CONG. REC. S5444 (daily ed. May 5, 1986) (statement of Sen. Byrd); FAA HISTORICAL CHRONOLOGY, 1926 – 1996, *supra* note 14.

¹⁷ 132 CONG. REC. S5444.

¹⁸ *Id.*

nine percent of GDP, and provide the country with 11.2 million jobs.¹⁹

The Department of Commerce initially focused on establishing safety guidelines and certifying pilots and aircrafts.²⁰ It also undertook projects to operate the lighted airways system and improve aeronautical radio communication.²¹ In 1936, the Department of Commerce assumed control of the first centers for air traffic control, whose primary function at the time was ensuring that airplanes safely traveled separate routes between cities to avoid collisions.²² These functions shifted in 1938 from the Department of Commerce to a new independent agency under the Civil Aeronautics Act, called the Civil Aeronautics Authority.²³ This new agency only lasted two years before being split into the Civil Aeronautics Administration and the Civil Aeronautics Board ("CAB").²⁴ The Civil Aeronautics Administration expanded air traffic control to include takeoff and landing operations at airports and administered the federal-aid airport program, which was designed to promote the development of civil airports through financial assistance.²⁵ Conversely, the CAB acted to advance the industry as a whole by regulating "entry into and exit from individual markets (by dictating the route patterns between cities and the frequency of flights), fares for passengers and cargo, safety, financing, subsidies to carriers flying on less profitable routes, mergers and acquisitions, inter-carrier agreements, and the quality of service."²⁶

In 1958, Congress passed the Federal Aviation Act ("the Act"), in response to a series of midair collisions and in preparation for the introduction of jet airliners into commercial aviation.²⁷ The Act repealed the Air Commerce Act of 1926 and the Civil Aeronautics Act of 1938, as well as other previously passed legis-

¹⁹ DRI-WEFA, INC., *THE NATIONAL ECONOMIC IMPACT OF CIVIL AVIATION* 6 (2002).

²⁰ EDMUND PRESTON, *U.S. CENTENNIAL OF FLIGHT COMM'N, THE FEDERAL AVIATION ADMINISTRATION AND ITS PREDECESSOR AGENCIES* (2005), http://www.centennialofflight.gov/essay/Government_Role/FAA_History/POL8.htm.

²¹ *Id.*

²² *Id.*

²³ *Id.*; FAA *HISTORICAL CHRONOLOGY, 1926-1996*, *supra* note 14, at 25-26.

²⁴ PRESTON, *supra* note 20.

²⁵ *Id.*

²⁶ ASIF SIDDIQI, *U.S. CENTENNIAL OF FLIGHT COMM'N, AIR TRANSPORTATION: DEREGULATION AND ITS CONSEQUENCES* (2005), http://www.centennialofflight.gov/essay/Commercial_Aviation/Dereg/Tran8.htm.

²⁷ *Id.*; See Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (1958); PRESTON, *supra* note 20.

lation dealing with civil aviation.²⁸ The policy considerations behind the Act encompassed all those of its predecessors and more, to fall into the headings of "economic regulation," "all-cargo air transportation consideration," "general safety considerations," "safety considerations in public interest," "international air transport action," and "strengthening competition."²⁹

Possibly the most important aspect of the Federal Aviation Act was the creation of the Federal Aviation Agency.³⁰ Repealing the functions of the previous legislation, the Act divided those functions between two independent agencies: the CAB and the Federal Aviation Agency.³¹ The CAB lost its safety rule-making authority in the transition of power.³² The Federal Aviation Agency was instead entrusted with making rules providing for aviation safety, in addition to inheriting the Civil Aviation Administration's responsibilities of "developing and maintaining a common civil-military system of air navigation and air traffic control."³³

In 1966, Congress created the Department of Transportation for management of all major transportation.³⁴ The Federal Aviation Agency was put within the new department and was renamed the Federal Aviation Administration (FAA).³⁵ Throughout the 60's, 70's, and 80's, the responsibilities of the FAA expanded well beyond those originally covered by the Act.³⁶ After a series of hijackings, the FAA was placed in charge of aviation security.³⁷ Aircraft noise standards, an airport funding aid program, and safety certification of airports served by air carriers were also added to their control.³⁸ The FAA developed improved air traffic control systems and created a new plan for addressing air traffic growth.³⁹

The U.S. government has substantial control over the processes of the airlines operating in the country through FAA

²⁸ Federal Aviation Act of 1958, 72 Stat. 731.

²⁹ See 49 U.S.C. § 40101 (2000); *Aviation Authority*, *supra* note 10.

³⁰ See *id.* § 106.

³¹ FAA HISTORICAL CHRONOLOGY, 1926-1996, *supra* note 14, at 69-70.

³² *Id.*; PRESTON, *supra* note 20.

³³ PRESTON, *supra* note 20.

³⁴ *Id.*; See also FAA HISTORICAL CHRONOLOGY, 1926-1996, *supra* note 14.

³⁵ PRESTON, *supra* note 20.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

operations.⁴⁰ The FAA has the power to effectively shut down non-compliant airlines and can create "regulations and minimum standards for other practices, methods, and procedure the Administrator finds necessary for safety in air commerce and national security."⁴¹ Within the Code of Federal Regulations, if the FAA determines that "a person has engaged, or is about to engage, in *any act or practice* constituting a violation of the Federal Aviation Act of 1958, or *any regulation or order issued under it* for which the FAA exercises enforcement responsibility . . .," then a council officer with designated authority "may request the United States Attorney General, or the delegate of the Attorney General, to bring an action in the appropriate United States District Court for such relief as is necessary or appropriate, including mandatory or prohibitive *injunctive relief*, *interim equitable relief*, and *punitive damages* . . ."⁴² Criminal penalties may be imposed on "any person who knowingly and willfully violates specified provisions of [the Federal Aviation] Act, or any regulation or order issued under those provisions."⁴³ The Administrator also has the power to issue "orders of compliance, cease and desist orders, [and] orders of denial. . ."⁴⁴ Lastly, "a State or Federal law enforcement officer, or a Federal Aviation Administration safety inspector, authorized in an order of seizure. . . may summarily *seize an aircraft* that is involved in a violation for which a civil penalty may be imposed on its owner or operator."⁴⁵

National security issues became an important issue following the terrorist attacks on September 11th, 2001.⁴⁶ In response, Congress created the Transportation Security Administration ("TSA") in the Aviation and Transportation Security Act of 2001, and relieved the FAA of some of the security responsibilities designated to it in the 1960's.⁴⁷ While this legislation shifted responsibilities, it in no way preempted or superseded the FAA's

⁴⁰ See generally 14 C.F.R. § 13 (2006).

⁴¹ 49 U.S.C. § 44701(a)(5) (2000).

⁴² 14 C.F.R. § 13.25 (emphasis added).

⁴³ *Id.* § 13.23.

⁴⁴ *Id.* § 13.20.

⁴⁵ *Id.* § 13.17.

⁴⁶ See generally Clyde Haberman, *The Nation: Past Ground Zero; The Distance Traveled in a Month of War*, N.Y. TIMES, Oct. 14, 2001, § 4 at 1.

⁴⁷ Aviation and Transportation Security Act, Pub. L. No. 107-71, § 114, 115 Stat. 597, 598, 601 (2001) (granting the TSA all day-to-day Federal security screening operations for passenger air transportation and intrastate air transportation); PRESTON, *supra* note 20.

safety and security authority.⁴⁸ The TSA has worked with the FAA to promote security and pass regulations in aviation to that end.⁴⁹ Coordination of efforts between the TSA and the FAA are necessary to ensure that operations continue smoothly and that appropriate flight restrictions are put in place.⁵⁰ The FAA defers to the TSA's security expertise to facilitate security-enhancing procedures as necessary, while the TSA defers to the FAA's operational and safety expertise in order to establish safe security measures.⁵¹

B. NATIONAL TRANSPORTATION SAFETY BOARD: THE ACCIDENT INVESTIGATOR

The National Transportation Safety Board ("NTSB") was created on April 1, 1967.⁵² It was established as an independent federal agency but relied upon funding and administrative support from the Department of Transportation ("DOT").⁵³ In 1975, the Independent Safety Board Act dissolved the NTSB's dependency on the DOT, and at present the NTSB is not affiliated with the DOT or any of their modal agencies.⁵⁴

The NTSB profoundly contributes to aviation safety in the United States through its comprehensive accident reports.⁵⁵ Under Title 49 of the United States Code, Chapter 11, the NTSB is responsible for the investigation of every civil aviation accident in the United States, as well as for publishing safety recommendations designed to prevent future accidents.⁵⁶ The NTSB is also charged with maintaining the government's records of civil aviation accidents and providing investigators for all aviation accidents occurring overseas in compliance with interna-

⁴⁸ See 49 U.S.C. § 114(g) (2006); Robert A. Sturgell, Deputy Adm'r, Fed. Aviation Admin., Testimony before the Committee on Government Reform and Oversight, on Controlling Restricted Airspace on Management and Coordination of Air Defense (July 21, 2005), http://www.faa.gov/news/news_story.cfm?contentKey=3187.

⁴⁹ See TSA Transportation Security Administration, <http://www.tsa.gov/index.shtm> (last visited Nov. 22, 2006).

⁵⁰ *Id.*

⁵¹ Sturgell, *supra* note 48.

⁵² Ntsb.gov, About the NTSB: History and Mission, http://www.nts.gov/Abt_NTSB/history.htm (last visited Jan. 20, 2006).

⁵³ *Id.*

⁵⁴ *Id.*; 49 U.S.C. § 1111 (2000).

⁵⁵ See generally 49 U.S.C. § 1111.

⁵⁶ *Id.* §§ 1111(g)(1), 1137(b).

tional treaties.⁵⁷ Furthermore, the NTSB serves as the “court of appeals” for parties who have incurred penalties from the FAA or when there is a certificate action taken by the FAA or U.S. Coast Guard.⁵⁸

As part of its role in making transportation recommendations, the NTSB makes aviation safety recommendations.⁵⁹ The NTSB publishes a “MOST WANTED” list of transportation safety improvements, which includes recommendations for research that the FAA should conduct and guidelines the NTSB believes the FAA needs to adopt.⁶⁰ Because the NTSB is responsible for investigating all civil aviation accidents, it has intimate knowledge of the sources of many aviation safety problems. The FAA’s acceptance and implementation of the changes recommended by the NTSB is slow at best.⁶¹ For example, a recommendation to “stop runway incursions and ground collisions of aircraft” has been on the NTSB’s Most Wanted list since 1990.⁶² The NTSB also recommends giving “immediate warnings of probable collisions/incursions directly to flight crews in the cockpit.”⁶³ This recommendation was emphasized again with the release of the 2006 list because of *three near collisions* within a six-month period in 2005.⁶⁴ These forms of collisions are supposed to be prevented by the FAA’s airport movement area safety system, but one of the closest calls occurred at the Logan International Airport where the system failed to prevent an Aer Lingus A330 and a U.S. Airways B737, carrying a combined total of 336 passengers, from traveling a mere 100 feet apart.⁶⁵ The NTSB has

⁵⁷ Ntsb.gov, About the NTSB: History and Mission, http://www.ntsb.gov/Abt_NTSB/history.htm (last visited Jan. 20, 2006).

⁵⁸ *Id.*

⁵⁹ See ntsb.gov, Recommendations and Accomplishments: Most Wanted Transportation Safety Improvements, http://www.ntsb.gov/recs/mostwanted/aviation_issues.htm (last visited Jan. 20, 2006) [hereinafter Most Wanted Transportation Safety Improvements].

⁶⁰ *Id.*

⁶¹ *List of NTSB ‘Most Wanted’ Safety Improvements Languish*, AIR SAFETY WK., Nov. 21, 2005, available at http://www.findarticles.com/p/articles/mi_mOUBT/is_2005_Nov_21/ai_n15868249.

⁶² *Most Wanted: 2006, The List Is Out . . . and Safety Board Pressures FAA to Take Swift Action on Aviation Improvements*, AVIATION WK. & SPACE TECH., Nov. 21, 2005, at 43 [hereinafter *Swift Action*]; see Most Wanted Transportation Safety Improvements, *supra* note 59.

⁶³ Most Wanted Transportation Safety Improvements, *supra* note 59.

⁶⁴ *Swift Action*, *supra* note 62.

⁶⁵ Most Wanted Transportation Safety Improvements, *supra* note 59.

identified the FAA's reaction to its recommendation as an "unacceptable response."⁶⁶

The NTSB also contributes to aviation safety at an international level.⁶⁷ First, the NTSB participates in all accident investigations where an American product is involved.⁶⁸ Second, the success of the NTSB has made it a model for many of the world's investigative bodies, and it has been called upon to help nations lacking expertise in accident investigations.⁶⁹ In August 2005, the Sudanese government asked for the NTSB's assistance investigating a helicopter crash that killed the Sudan's first vice-president.⁷⁰ The agency was also involved in the investigation in Athens of the Helios Airway Boeing 737 crash from August 2005.⁷¹ To assist in the training of accident investigators internationally, the NTSB created the "NTSB Academy."⁷² In the area of aviation training, the NTSB Academy offers Aircraft Accident Investigation, Accident Investigation Orientation, and Survival Factors in Aviation Accidents.⁷³ The courses the academy offers are open to a variety of people, including "investigators from the NTSB and other accident investigation authorities/commissions worldwide," along with "potential participants in an NTSB investigation: Investigative and safety personnel employed by airframe, engine or component manufacturers, airlines, civilian and military agencies, and related labor unions," and "members of the academic community attending for research purposes."⁷⁴

C. STATE LAW ANSWERS TO AVIATION ISSUES

States have the power to create legislation regarding aviation under two conditions.⁷⁵ First, state law cannot contradict any

⁶⁶ *Id.*

⁶⁷ Frances Fioriono, *NTSB Training: Agency's School Hones Skills For Accident Investigators Worldwide*, AVIATION WK. & SPACE TECH., Aug. 22, 2005, at 77.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*; see generally [nts.gov](http://www.nts.gov), NTSB Training Center, <http://www.nts.gov/academy/> (last visited Jan. 24, 2006).

⁷³ [Ntsb.gov](http://www.nts.gov), NTSB Training Center: Scheduled Courses, http://www.nts.gov/Academy/sched_courses.htm (last visited Jan. 24, 2006).

⁷⁴ See, e.g., [nts.gov](http://www.nts.gov), NTSB Training Center – Aircraft Accident Investigation (AS101) http://www.nts.gov/Academy/CourseInfo/AS101_2006.htm (last visited Jan. 15, 2006).

⁷⁵ See generally *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002); 49 U.S.C. § 41713 (2000).

regulations promulgated by the FAA or Congress.⁷⁶ Second, “[s]tates may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.”⁷⁷ The interpretation of preemption of state law by the Federal Aviation Act has varied by jurisdiction.⁷⁸ The Third Circuit has found that the Act preempts all state laws on aviation safety, while it preserves the state and territorial claims.⁷⁹ The Sixth Circuit found that, where the Federal Aviation Act was silent and not pervasive, a local government had the authority to write laws on a matter.⁸⁰

Despite the limitations on what states can legislate regarding aviation, they do still create aviation councils and laws governing operations within the states.⁸¹ In Texas, for example, the Aviation Advisory Committee presents information for the Aviation Division of the Texas Department of Transportation on its aviation development programs and serves as its representative among aviation users.⁸² The committee also works with members of the state legislature on aviation issues that arise.⁸³

II. THE EUROPEAN UNION’S CONTINUING EFFORTS TO UNIFY MEMBER STATES UNDER A SINGLE SKY

The European Union began in the 1950’s as an effort to unify Europe and ultimately to bring markets and countries together under central rule on key international issues.⁸⁴ While legislation and approaches to various issues differ, the common theme remains unity.⁸⁵ The EU established and removed several different agencies in an effort to bring the European aviation industry

⁷⁶ See generally *Sprietsma*, 537 U.S. at 64.

⁷⁷ 49 U.S.C. § 41713.

⁷⁸ See generally *Greene v. B.F. Goodrich Avionics Sys., Inc.*, 409 F.3d 784, 795 (6th Cir. 2005).

⁷⁹ *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 364-65 (3d Cir. 1999).

⁸⁰ *Gustafson v. City of Lake Angelus*, 76 F.3d 778, 784 (6th Cir. 1996).

⁸¹ See generally TEX. TRANSP. CODE ANN. § 21.003 (Vernon 1999).

⁸² See *id.*; TXDOT Aviation Division Texas Aviation Advisory Committee, <http://www.dot.state.tx.us/avn/aviationadvisorycommittee.htm> (last visited Jan. 24, 2006) [hereinafter TXDOT].

⁸³ TXDOT, *supra* note 82.

⁸⁴ Europa – The EU at a Glance – The History of the European Union, http://europa.eu.int/abc/history/index_en.htm (last visited Jan. 22, 2006).

⁸⁵ Europa – Key Facts and Figures About Europe and the Europeans, http://europa.eu.int/abc/keyfigures/index_en.htm (last visited on Jan. 10, 2006).

together under a “single European sky.”⁸⁶ As the law stands currently, the Member States of the EU have the power to govern limited areas of aviation but must comply with the European Aviation Safety Agency on all other aviation matters.⁸⁷

A. CREATION OF AN AUTHORITY: THE EUROPEAN AVIATION SAFETY AGENCY

The European Community (“EC”) originally established the Joint Aviation Authority (“JAA”) to provide aviation guidelines for all the countries in the EU.⁸⁸ JAA created rules called Joint Aviation Regulations (“JARs”) for “operations, maintenance, licensing and certification/design standards for all classes of aircraft” that would bind Member States.⁸⁹ JAA established various regulations and developed a positive reputation that even resulted in countries outside the EU choosing to abide by those regulations.⁹⁰ Despite some successes, JAA was relatively unsuccessful in their principal role because they were forced to gain unanimous support for the passage of regulations, and they lacked the power to enforce any of the regulations they mandated.⁹¹ Individual Member States bore the responsibility of making the JARs the national law, and many failed to promptly pass the regulations into their domestic law.⁹² As a result, in 1998 the EC began to explore alternatives to the JAA in search of a unified standards organization that would not require unanimous Member State approval in creating JARs.⁹³ By 2002, it became clear to the EC that the proposed agency would also need the power to force Member States to implement regulations.⁹⁴

The European Aviation Safety Agency (“EASA”) was created and became operational on September 28, 2003 as the principal

⁸⁶ The European JAA: Introduction to JAA, <http://www.jaa.nl/introduction/introduction.html> (last visited Jan. 20, 2006) [hereinafter Introduction to JAA].

⁸⁷ Press Release, European Council, New Missions for the European Safety Agency (Nov. 15, 2005).

⁸⁸ Introduction to JAA, *supra* note 86.

⁸⁹ *Id.*

⁹⁰ See generally *Commission Launches Talks To Form European FAA*, AVIATION DAILY, Dec. 12, 1996, at 417.

⁹¹ David Learmont, *Sustainable*, FLIGHT INT'L, May 15, 2001, at 51 [hereinafter *Sustainable*].

⁹² *Id.*

⁹³ *EU Proposes Common Aviation Authority*, AERO SAFETY & MAINT., July 10, 1998, at 3.

⁹⁴ See generally Commission Regulation 1592/2002, 2002, O.J. (L 240) 1,2 (EC) [hereinafter Regulation 1592/2002].

agency for enacting JARs as EU law.⁹⁵ As EU law, the regulations no longer needed to be implemented within the individual Member State governments, and as they were passed, they automatically became the law of the member countries.⁹⁶ This remedied one of the problems experienced by the JAA.⁹⁷ The areas included within the scope of EASA's power include: "(a) the design, production, maintenance and operation of aeronautical products, parts and appliances, as well as personnel and organizations involved in the design, production and maintenance of such products, parts and appliances;" and "(b) personnel and organizations involved in the operation of aircraft."⁹⁸

EASA began their takeover of JAA responsibilities slowly.⁹⁹ Their slow beginnings left the agency open to a wide range of criticism that has dissipated in the past year as its role and powers have become clearer.¹⁰⁰ The JAA remains in operation at present, but EASA will complete their takeover of the JAA's responsibilities by the close of 2006.¹⁰¹ The EC proposed the extension of EASA's powers in late 2005 to include airline operations, staff qualifications, and the safety of foreign carriers.¹⁰² The change would force foreign carriers to abide by common operational rules, which is a policy already in effect in the United States.¹⁰³

Similar to JAA, EASA's standards and reputation have attracted members outside the European Union. While these states are not necessarily bound in the same way as states in the EU, they enjoy the benefit of identifying themselves as following EASA's standards, which appeals to airlines and governments that lack their own highly regarded domestic civil aviation authority.¹⁰⁴ EU countries, however, are bound by EASA's laws, which effectively unify their aviation industry.¹⁰⁵ For example,

⁹⁵ *European Aviation Space Agency Goes Live*, FLIGHT INT'L, Sept. 30, 2003, at 5.

⁹⁶ *Id.*

⁹⁷ See Learmont, *supra* note 91, at 51.

⁹⁸ Regulation 1592/2002, *supra* note 94.

⁹⁹ David Learmont, *Must Do Better: The View From the National Authorities*, FLIGHT INT'L, Sept. 27, 2005, at 36.

¹⁰⁰ *Id.*

¹⁰¹ David Learmont, *EASA Sets Timetable For Takeover*, FLIGHT INT'L, Sept. 20, 2005, at 5.

¹⁰² See *Agenda for 2010*, *supra* note 7, at 2.

¹⁰³ Martial Tardy, *Barrot to Propose More Air Safety Legislation in Fall*, AVIATION DAILY, Aug. 18, 2005, at 3.

¹⁰⁴ David Learmont, *Goudou Plots Future as EASA Continues to Grow*, FLIGHT INT'L, June 14, 2005, at 26.

¹⁰⁵ *Id.*

Article 8, Section 1, of the EASA Basic Regulation requires that an aircraft certified in one EU country is necessarily certified in remaining member countries: "Member States shall, without further technical requirements or evaluation, recognize the certificates issued in accordance with this Regulation. When the original recognition is for a particular purpose, or purposes, any subsequent recognition shall cover only the same purpose(s)."¹⁰⁶

The FAA and EASA were both designed for a similar goal of creating a leading government authority on the management of aviation issues. Both the United States and the EU struggled through various authorities in governing the aviation industry and ultimately strengthened their aviation program by having a central, leading regulatory agency. Interestingly, both the EU and the United States had to protect the rights of the states under the FAA and EASA's control and thus had to leave room for independent, local civil aviation authorities. By limiting the realm of state control to smaller issues, the true power and authority remained at a level that promoted federal interests and supported the idea of a single sky.

EASA does not, however, have as much power to enforce its regulations as does the FAA.¹⁰⁷ While the FAA has power as an administrative agency to force compliance independent from the federal government,¹⁰⁸ EASA must ask the EC to take the violating member state to the European Court of Justice on a breach of treaty claim.¹⁰⁹ This process may take two years before resolution.¹¹⁰ The effect of this enforcement limitation will be seen in the years to come. If the European Court continues to support the legislation that they promulgate, there may be little room for resistance in Member States.¹¹¹ Similar to the FAA's rules being subject to interpretation and review by the courts, EASA's rules are subject to review by the European Court of Justice.¹¹² The European Court's positive review of legislation helps reinforce the compliance of airlines and national authori-

¹⁰⁶ Regulation 1592/2002, *supra* note 94, art. 1, § 8.

¹⁰⁷ *Id.*

¹⁰⁸ Justin Wastnage, *FAA Raises Concerns over EASA Standardization*, FLIGHT INT'L, Feb. 22, 2005, at 8.

¹⁰⁹ See 49 U.S.C. § 40101 (2000).

¹¹⁰ Wastnage, *supra* note 108.

¹¹¹ *Id.*

¹¹² See generally Press Release, European Commission, Air Passengers' Rights: The European Court of Justice Confirms Legality of EU Rules (Jan. 10, 2006) (confirming the validity of EC legislation on passenger's rights).

ties and is, thus, essential to the successful operation of EASA.¹¹³ Implementation of regulations differs between the FAA and EASA as well. The FAA is an administrative agency, which allows it to create and disseminate regulations that effectively become national law.¹¹⁴ EASA, however, only has the power to create mandates for change, which then must be issued as regulations by the EC.¹¹⁵

B. THE NATIONAL CIVIL AVIATION AUTHORITIES OF EU MEMBER STATES

While EASA may represent the standards that are required from all the members of the EU, its inception did not eliminate the practices of the individual states' aviation authorities.¹¹⁶ For instance, the United Kingdom Civil Aviation Authority ("CAA") still operates and reviews the legislation and rules passed by EASA.¹¹⁷ National authorities retain the power to issue licenses, conduct inspections and audits of training organizations and medical centers, and issue certificates to EU carriers.¹¹⁸

The United Kingdom CAA has struggled with the adjustment to the new aviation authority. With EASA's creation, national legislation on airworthiness directives was to be eliminated.¹¹⁹ While a few of the United Kingdom CAA's airworthiness directives were kept by EASA, over 100 airworthiness directives of the CAA (which is regarded as a *conservative* aviation authority) were lost in the transition of power.¹²⁰ In response, the CAA urged EASA to adopt specific directives for implementation across the EU Member States.¹²¹ The CAA has published criticism over the operation of EASA.¹²² In April of 2005, the chairman of the United Kingdom CAA, Sir Roy McNulty, claimed that EASA suffered from "a lack of proper planning, management and gov-

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ 5 U.S.C.A. § 552 (2006).

¹¹⁶ Norbelt Lohl, *European Aviation Safety Agency*, FLIGHT INT'L, Aug. 1, 2005, at 12.

¹¹⁷ See, Press Release, European Commission, New Missions for the European Safety Agency (Nov. 15, 2005).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Justin Wastnage, *CAA Tackles EASA Issue*, FLIGHT INT'L, Aug. 30, 2005, at 8.

¹²¹ *Id.*

¹²² *Id.*

ernance.”¹²³ In support of his statements, he blamed the EU for failing to provide EASA with a proper budget.¹²⁴ EASA was expected to coordinate the planning of unified EU aviation laws with the national aviation authorities, but according to McNulty, they had failed to do so.¹²⁵ EASA allegedly did not work with the industry and national aviation authorities in their efforts at standardizing requirements across the EU, but instead set a new agenda with a “Euroland” attitude.¹²⁶ The FAA shared similar concerns after they reviewed EASA in February of 2005 and found that there was a “lack of sanctions for underperforming member states” and would not pinpoint their concerns over EASA’s standardization process.¹²⁷

C. EUROPEAN CIVIL AVIATION CONFERENCE

In 1955, the European Civil Aviation Conference (“ECAC”) was founded “to promote the continued development of a safe, efficient and sustainable European air transport system.”¹²⁸ Forty-two countries are members of the ECAC, which makes it the widest grouping of any European aviation organization.¹²⁹ ECAC convenes triennially to discuss policy issues in aviation throughout Europe.¹³⁰ ECAC seeks to “harmonize civil aviation policies and practices amongst its Member States” and “promote understanding on policy matters between its Member States and other parts of the world.”¹³¹

ECAC developed the Safety Assessment of Foreign Aircraft Program (“SAFA”) following a transport crash from Turkey that resulted in the deaths of many German tourists.¹³² The pro-

¹²³ David Learmount, *McNulty: EASA failing to deliver*, FLIGHT INT’L, April 19, 2005, at 14.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Wastnage, *supra* note 108, at 8.

¹²⁸ European Civil Aviation, Conference [ECAC], About ECAC, <http://www.ecac-ceac.org/index.php?content=presentation&idMenu=1> (last visited Jan. 17, 2006).

¹²⁹ ECAC, About ECAC: ECAC Member States, <http://www.ecac-ceac.org/index.php?content=lstsmember&idMenu=1&idSMMenu=10> (last visited Jan. 17, 2006).

¹³⁰ ECAC, About ECAC: How ECAC Functions, <http://www.ecac-ceac.org/index.php?content=fonctionnement&idMenu=1&idSMMenu=6> (last visited Jan. 17, 2006).

¹³¹ About ECAC, *supra* note 128.

¹³² Michael Taverna, *Quality Seal: France Pushes for New Label, Tougher Rules to Weed Out Unsafe Foreign Carriers*, AVIATION WK. & SPACE TECH., Aug. 1, 2005, at 38.

gram was designed to create confidence in the safety oversight of other member states and ultimately promote a successful, reliable air transport system.¹³³ ECAC launched the program in tandem to the release of the ICAO audit system, Universal Safety Oversight Audit Program ("USOAP").¹³⁴ SAFA uses a bottom-up approach, starting with ramp inspections of aircrafts and progressing to the involvement of States of Registry or States of Operator.¹³⁵ SAFA also provides a way for members of the ECAC to share which carriers are banned from operating in their borders.¹³⁶ Lastly, in the summer of 2005, France and other ECAC nations recommended that SAFA become mandatory for all EU countries as a European Union directive.¹³⁷

D. INTERNATIONAL AGREEMENTS FOR DEVELOPING THE FUTURE

While EASA governs the safety involved with EU Member States, multiple bodies of the EU work to establish the aviation agreements that it reaches with other countries.¹³⁸ For instance, the EU has conducted ongoing negotiations with the United States regarding sharing passenger data.¹³⁹ After the September 11th, 2001 terrorist attacks, the United States adopted legislation that would require all carriers traveling to and from the United States to provide the U.S. Bureau of Customs and Border Protection with electronic access to the data contained in their systems for monitoring and controlling departures.¹⁴⁰ Following deliberations and negotiations with the United States, the Commission of the European Communities adopted a decision whereby the EC would provide the information the United States requested as long as the United States provided protection for the passenger data involved.¹⁴¹ The European Court of Justice later annulled the agreement in May of 2006 and gave

¹³³ The SAFA (Safety Assessment of Foreign Aircraft) Programme, <http://www.ecac-ceac.org/index.php?content=static§ion=page1> (last visited Oct. 24, 2006) [hereinafter SAFA].

¹³⁴ Taverna, *supra* note 132, at 38.

¹³⁵ SAFA, *supra* note 133.

¹³⁶ David Lermount, *Europe to Set Up Rogue Aircraft Warning System*, FLIGHT INT'L, Apr. 19, 2005, at 14.

¹³⁷ Taverna, *supra* note 132, at 38.

¹³⁸ See *EC Prepares To Resume US Open Skies Talks*, FLIGHT INT'L, Aug. 9, 2005, at 14.

¹³⁹ Joined Cases C-317 & C-318/04, *Comm'n v. Parliament*, 2005 ECR CELEX LEXIS 624 (Nov. 22, 2005).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

the EU until September 30, 2006, to find a new legal solution.¹⁴² Ultimately, an agreement could not be reached by the deadline under the governing laws, and as a result a “legal black hole” was created by the lack of agreement.¹⁴³ Airlines that refused to provide passenger information to the United States could lose landing rights, while airlines that shared the information could potentially be the subject of legal action under the EU member states’ data protection laws.¹⁴⁴ The Department of Transportation created a special order that effectively “patched” the hole by allowing EU carriers to share information with the United States without risk of prosecution under the EU data protection law.¹⁴⁵

The EU is also responsible for signing agreements that allow European airlines to fly between any EU Member State and a non-Member.¹⁴⁶ These agreements do not replace pre-existing bilateral agreements between the EU Member States and a given non-Member, but they do have the effect of creating an agreement that falls within EU law.¹⁴⁷

One ongoing goal shared by the EU and the United States is the open aviation area agreement that has yet to be reached.¹⁴⁸ As the law currently stands, there are nationality agreements that limit the operation of a carrier who wants to fly to the United States from another country.¹⁴⁹ For instance, a German carrier in England may not fly to the United States from the United Kingdom because they lack English nationality.¹⁵⁰ Laws

¹⁴² Joined Cases C-317 & 318/04, *Comm’n v. Parliament*, 2006 ECV CELEX LEXIS 239 (May 30, 2006) (annulling on the grounds the EU Data Protection Directive that both the European Commission and the Council of the European Union based their actions on did not apply to data collected for security purposes).

¹⁴³ *EU-US Airline Data Talks Collapse*, BBC NEWS, Sept. 30, 2006, available at <http://news.bbc.co.U.K./2/hi/europe/5395928.stm>.

¹⁴⁴ *Id.*

¹⁴⁵ *U.K. Flights Sidestep Security Row*, BBC NEWS, Oct. 1, 2006, available at http://news.bbc.co.U.K./2/hi/U.K._news/5396018.stm.

¹⁴⁶ Press Release, European Commission, European Union Signs Aviation Agreement with Ukraine (Dec. 1, 2005), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/051516>.

¹⁴⁷ *Id.*

¹⁴⁸ Press Release, European Commission, Europe and the United States Negotiating a Joint Aviation Agreement (Oct. 14, 2005), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/05/376>.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

with nationality basis are not permitted in the EU because they limit the rights of EU Member States.¹⁵¹

III. ALTRUISM: INTERNATIONAL ORGANIZATIONS' EFFORTS TOWARDS FOSTERING AVIATION SAFETY

Governmental agencies are not the only source for recommended best practices. Several international organizations review industry information and work with air carriers towards improving aviation conditions with regards to safety and operations. While membership in these organizations and compliance with their regulations is voluntary, the effect that they have on international aviation can be substantial.

A. THE UN'S INTERNATIONAL CIVIL AVIATION ORGANIZATION

In November of 1944, the U.S. government invited fifty-five states or authorities to an International Civil Aviation Conference in Chicago.¹⁵² Fifty-two of the states in attendance signed the International Civil Aviation Organization to secure international co-operation and uniformity in regulations.¹⁵³ The ICAO functions as a specialized agency of the UN, with the broad purpose of ensuring "the safe, efficient and orderly evolution of international civil aviation."¹⁵⁴

The composition of the ICAO mirrors that of the UN, with an Assembly, Council, and Secretariat.¹⁵⁵ Two chief officers, the President of the Council and the Secretary General, head the organization.¹⁵⁶ The Assembly is the sovereign body composed of members from every contracting state.¹⁵⁷ There are currently 189 contracting states.¹⁵⁸ The Council is comprised of thirty-six

¹⁵¹ *Id.*

¹⁵² International Civil Aviation Organization [ICAO], Foundation of the International Civil Aviation Organization (ICAO), <http://www.icao.int/icao/en/history02.htm> (last visited Oct. 24, 2006).

¹⁵³ *Id.*

¹⁵⁴ ICAO, Making an ICAO Standard, <http://www.icao.int/icao/en/anb/mais/> (last visited Oct. 24, 2006).

¹⁵⁵ ICAO, How It Works, http://www.icao.int/cgi/goto_m.pl?/icao/en/how-works.htm (last visited Oct. 24, 2006).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ ICAO, Contracting States, <http://www.icao.int/> (follow "About ICAO" hyperlink; then follow "Contracting States" hyperlink) (last visited Oct. 24, 2006) [hereinafter Contracting State].

states with a governing body elected by the Assembly.¹⁵⁹ Last, the Secretariat is led by the Secretary General and divided into five divisions that include the Air Navigation Bureau, the Air Transport Bureau, the Technical Co-operation Bureau, the Legal Bureau, and the Bureau of Administration and Services.¹⁶⁰

The ICAO is responsible for the creation of Standard and Recommended Practices, or SARPs, which cover all operational and technical aspects of international aviation.¹⁶¹ Once the ICAO endorses a SARP, it is annexed to the Chicago Convention without ratification by the States.¹⁶² The SARPs are often referred to in crash investigations, even by countries that are not members of the ICAO.¹⁶³ For instance, in October 2000 an aircraft in Taiwan crashed as a result of the plane taking off from the wrong runway, which at the time was being converted into a taxiway.¹⁶⁴ The subsequent investigation revealed that the accident could have been prevented had the runway simply been painted with a white cross as required by the ICAO.¹⁶⁵ Taiwan was not then, and is not now, a contracting state of the ICAO.¹⁶⁶

B. THE INTERNATIONAL AIR TRANSPORT AUTHORITY

The International Air Transport Authority ("IATA") was founded in 1945 with delegates from thirty-one countries, and it was eventually incorporated in Canada.¹⁶⁷ Its initial work was performed in cooperation with the ICAO in developing regulations for airline operations and related legislation.¹⁶⁸ After the signing of a bilateral agreement between the United Kingdom and the United States, IATA was put in the position of developing proposals of fares and rates, which would be subject to governmental approval.¹⁶⁹

The IATA created the IATA Operational Safety Audit ("IOSA") in 2003,¹⁷⁰ which was designed to promote a higher

¹⁵⁹ How It Works, *supra* note 155.

¹⁶⁰ *Id.*

¹⁶¹ Making an ICAO Standard, *supra* note 154.

¹⁶² *Id.*

¹⁶³ *Taiwan Safety Council Report on SIA Crash Draws Criticism*, AVIATION DAILY, Apr. 29, 2002, at 5.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*; Contracting State, *supra* note 158.

¹⁶⁷ INT'L AIR TRANSP. ASS'N, 2005 ANNUAL REPORT 4 (2005).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 17.

level of safety among air carriers by holding them to a higher standard for certification.¹⁷¹ The FAA gave its approval to the standard in 2004 by giving U.S. carriers authorization to use the audit for safety standards at codeshare partner airlines.¹⁷² Beginning in 2006, in an effort to become a quality organization, IATA increased the demands on its members and those wishing to gain membership by requiring states to pass an IOSA as a contingency of membership.¹⁷³

IATA represents the rights of airlines and airports on a variety of issues. In 2004, IATA fought regulations imposed by the EC, which gave passengers more avenues to sue air carriers.¹⁷⁴ IATA argued that this put an unfair burden on carriers who were made susceptible to suit for things completely out of their control and unnecessarily added \$700 million in costs to the carriers.¹⁷⁵ The European Court ultimately ruled on the side of the EC, upholding the new regulations.¹⁷⁶ European Court decisions are binding and have no appeals process, which leaves IATA and airlines with little recourse.¹⁷⁷ In response to the ruling, the IATA declared their resolve to pursue an overhaul of the legislation by lobbying the new administration at the EC.¹⁷⁸

C. FLIGHT SAFETY FOUNDATION: AN INTERNATIONAL ORGANIZATION FOR EVERYONE CONCERNED WITH SAFETY OF FLIGHT¹⁷⁹

The U.S.-based Flight Safety Foundation ("FSF") is an "independent, nonprofit, international organization that performs research, inspections, education, advocacy and publishing to improve aviation safety."¹⁸⁰ Their mission is to "pursue the con-

¹⁷¹ International Air Transport Authority [IATA], IATA Operational Safety Audit (IOSA), <http://www.iata.org/ps/services/iosa/index.htm> (last visited Oct. 24, 2006).

¹⁷² *Safety Audit Wins FAA Codeshare Check Approval*, FLIGHT INT'L, July 20, 2004, at 23.

¹⁷³ Jens Flottau, *IATA Takes Aim at Accident Numbers by Setting Members' Mandatory Goals*, AVIATION WK. & SPACE TECH., Jan. 9, 2006, at 37.

¹⁷⁴ Robert Wall, *Try, Try Again*, AVIATION WK. & SPACE TECH., Jan. 16, 2006, at 428.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Flightsafety.org, Welcome to the Flight Safety Foundation, <http://www.flightsafety.org/home.html> (last visited Jan. 21, 2006).

¹⁸⁰ Flightsafety.org, About Flight Safety Foundation, http://www.flightsafety.org/about_fsf.html (last visited Oct. 23, 2006).

tinuous improvement of global aviation safety and the prevention of accidents.”¹⁸¹ Similar to IATA, the FSF provides safety audit services for airlines, airports, and repair stations.¹⁸² Membership in the FSF is geared toward individual air carriers as opposed to entire countries.¹⁸³ Their membership includes global leaders in aviation such as American Airlines, British Airways, and Continental Airlines.¹⁸⁴ Further demonstrating the international recognition of FSF, the United Kingdom CAA is a subscriber of the FSF, and the United States FAA is a patron.¹⁸⁵ FSF also conducts research on a variety of issues, such as statistics on the causes of aviation accidents and the preventative measures that can be used to stop them.¹⁸⁶ These statistics help show the effects of regulatory actions and guide the writing of future regulations.¹⁸⁷

IV. THE FUTURE OF INTERNATIONAL AVIATION SAFETY IN AN EXPANDING GLOBAL COMMUNITY

In order to plan for the future, safety procedures and general operation regulations will have to be tightened and strengthened. EASA is making efforts to move towards clear aviation guidelines that will be easy to follow, and once established across all members of the European Union, it will be easier to increase and improve regulations and guidelines. The past few years have seen remarkably fewer aviation accidents, but 2005 was a return to prior poor statistics. The culprit to the change was predominantly countries that allow air carriers with poor safety standards to operate within their borders.

A. THE TRENDS IN AVIATION ACCIDENTS

In previous years, the aviation industry had seen an overall decline in the number of fatal accidents, but 2005 marked a dis-

¹⁸¹ Flightsafety.org, Flight Safety Foundation Membership, <http://www.flight.safety.org/membership.html> (last visited Oct. 23, 2006).

¹⁸² Flightsafety.org, Flight Safety Foundation Safety Services, http://www.flight.safety.org/safety_services.html (last visited Oct. 23, 2006).

¹⁸³ Flightsafety.org, Flight Safety Foundation Membership, *supra* note 181.

¹⁸⁴ Flightsafety.org, Flight Safety Foundation Member List, http://www.flight.safety.org/member_list.cfm (last visited Oct. . 23, 2006).

¹⁸⁵ *Id.*

¹⁸⁶ See Dick McKinney, *Preventing Overruns on Landing, With the Right Technology, Training and Discipline We Can Stop Them Cold*, BUS. & COM. AVIATION, Dec. 1, 2005, at 61.

¹⁸⁷ See generally *id.*

appointing increase.¹⁸⁸ The number of fatalities began to decline in 2002 with 1,022 fatalities, in 2003 there were 702, and in 2004 there were 466.¹⁸⁹ In 2005, however, crash fatalities rose to a staggering 1,050, which almost totals the fatalities of 2003 and 2004 combined.¹⁹⁰ Decision makers are left with the question – what does this mean for the future with *increasing numbers* of planes and *developing nations entering* the market? The major fatal accidents had several preventative factors in common.¹⁹¹ These crashes involved airlines that were operating out of countries with poor safety records compared to the world average.¹⁹² The crashed aircrafts reflected in the numbers were almost all from states with struggling economies where aviation safety was not a political priority.¹⁹³

In order to lower the accident rate across the world, communication of air safety information will need to be shared between all carriers.¹⁹⁴ Many of the agencies and organizations previously discussed within this comment serve to improve communications and share operation practices in an effort to find the best practices.¹⁹⁵

B. PROBLEM CHILDREN: COUNTRIES AND CONTINENTS

In 2001, if all the countries of the world could have attained the same quality of flight operations as the United States, Canada, and Western Europe, the number of accidents around the world would have been reduced by sixty percent.¹⁹⁶ According to ICAO, airlines operating in Africa and parts of Latin America and Asia are responsible for a proportionately high number of serious accidents compared to their overall percentage of the world's air traffic.¹⁹⁷

¹⁸⁸ David Learmount, *Reverse Gear*, FLIGHT INT'L, Jan. 10, 2006, at 30.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ Edward Phillips, *Global Teamwork Called Key to Improving Aviation Safety*, AVIATION WK. & SPACE TECH., July, 16, 2001, at 70.

¹⁹⁵ See About Flight Safety Foundation, *supra* note 180; IATA, Collaborative Decision Making, <http://www.iata.org/ps/training/courses/tcvt08.htm> (last visited Oct. 23, 2006).

¹⁹⁶ Phillips, *supra* note 194, at 70.

¹⁹⁷ Learmount, *supra* note 188, at 30.

Aviation problems stemming from China are in many ways paradoxical.¹⁹⁸ First, air safety experts have noted the problem of accountability.¹⁹⁹ David Learmount, an aviation expert, identifies a problem with Chinese flight crews admitting problems and bases the difference on cultural grounds.²⁰⁰ In Asia, as in other places around the world, people are reluctant to admit fault for fear of demotion and public humiliation.²⁰¹ In aviation it is understandable how this type of failure can be deadly.²⁰² For instance, on March 31, 2005, a China Eastern Airlines flight experienced trouble taking off, and flew five feet above the ground for several moments before landing hard with sparks flying, and then lifting up normally.²⁰³ Standard operating procedure would dictate that the flight return to the airport for inspection of the plane.²⁰⁴ Instead, when the air traffic controllers contacted the plane to verify that the crew knew what had happened, the crew expressed no concern about the incident and continued on their thirteen-hour flight to Shanghai.²⁰⁵ To address public embarrassment concerns and maintain accuracy in reporting of accidents, the United Kingdom and United States both developed systems that allowed aircraft crew to report mistakes of unsafe practices without placing blame or dealing with retribution.²⁰⁶ This avoidance of addressing the problem is juxtaposed with the high levels of technology used in China.²⁰⁷ Air China enhanced their Boeing 757 to include Required Navigation Performance, a system that utilizes satellite navigation information to help manage an aircraft's flight management system.²⁰⁸ On average, China's planes are half the age of most American planes, and their crews are trained by the same manufacturers, Boeing and Airbus, as their United States counterparts.²⁰⁹

¹⁹⁸ Michael Westlake, *As Chinese Aviation Takes Off, Sparks Fly*, AEROSPACE AM., Sept. 2005, at 8.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

In 2004, Africa had an accident rate seventeen times higher than that of North America.²¹⁰ A staggering 25% of the world's aviation accidents occur on a continent where only 4.5% of world air traffic occurs.²¹¹ The high accident rate in Africa is attributed to the continent's lack of operational controls and human error or incompetence.²¹² South Africa's transport minister, Jeff Radebe, addressed the changes in aviation around the world in a speech at an aviation conference.²¹³ He noted that while the United States focused on security in aviation as a result of its campaign against terrorism, the world had been forced to respond and increase their security in order to do business internationally with the United States.²¹⁴ Beyond the safety concerns, the United States Air Forces in Europe identified Africa as a potential terrorist operations area because of the lack of governmental controls in many places, and as a result, there will most likely be no leniency in meeting the security requirements being set internationally.²¹⁵ Thus, Africa not only has the burden of trying to catch up to the rest of the world in terms of an advanced aviation industry, but now *also* has the burden of meeting even more standards in order to participate in international aviation, which is especially difficult when Africa's first priority is still achieving safety in flight.²¹⁶

Nigeria provides a powerful example of the struggle experienced within the African aviation industry.²¹⁷ Nigeria has the largest population of any of the African nations, with approximately 132 million people,²¹⁸ meaning that it also has the greatest need for safe and effective transportation in addition to the biggest aviation sector in all of Africa.²¹⁹ Corruption of aviation

²¹⁰ Flottau, *supra* note 173, at 37.

²¹¹ Frances Fiorino, *Revitalizing Africa*, AVIATION WK. & SPACE TECH., Oct. 10, 2005, at 15.

²¹² See *id.*; Jeff Radebe, *In Africa, Safety Is More Important than Security*, AVIATION WK. & SPACE TECH., July 12, 2004, at 58.

²¹³ Jeff Radebe, *supra* note 212.

²¹⁴ *Id.*

²¹⁵ See David A. Fulghum, *Frontiers Disappear*, AVIATION WK. & SPACE TECH., Mar. 15, 2004, at 56.

²¹⁶ Radebe, *supra* note 212, at 58.

²¹⁷ See *Ethiopian Airlines Is Africa's First Carrier*, THIS DAY, July 15, 2005, available at <http://www.thisdayonline.com/nview.php?id=22641>.

²¹⁸ Central Intelligence Agency [CIA], CIA – The World Factbook – Nigeria, <http://www.cia.gov/cia/publications/factbook/geos/ni.html> (last visited Oct. 23, 2006).

²¹⁹ See *Ethiopian Airlines Is Africa's First Carrier*, *supra* note 218.

officials,²²⁰ financial limitations,²²¹ poorly organized search and rescue operations,²²² and archaic equipment and maintenance systems plague the development of Nigerian airspace.²²³ Similar to developed nations, Nigeria has a leading governmental authority on aviation, the Nigerian Civil Aviation Authority ("NCAA"), with the power to shut down airlines on various grounds, such as poor maintenance records.²²⁴ The Nigerian Aviation Ministry has managed to exert control over the NCAA's operations, however, and has limited its overall effectiveness by intruding upon its exclusive right to govern aviation safety and seizing the opportunities for aviation professionals in overseas training for its own minister's benefit.²²⁵ Search and rescue operations in Nigeria are especially weak, and other international authorities have been called in for accident assistance.²²⁶ For example, in October of 2005 a plane crash in the village of Lisa took almost two weeks to be excavated.²²⁷ The delay resulted from a lack of heavy equipment needed for the excavation and lead to a fear of a possible outbreak of epidemic, brought about from the stench from rapidly decomposing bodies of the 117 crew members and passengers who perished in the crash.²²⁸ The NTSB sent accident investigators to the crash site at the request of the Nigerian federal government.²²⁹ To compound matters, the identification of victims of the crash required the submission of photos by family members to identify remains because many people onboard did not travel with tickets bearing their names.²³⁰ In addition to general passenger identification problems throughout the Nigerian aviation industry, NCAA discovered that of the fifty-three operating commercial flights in the country, twenty-nine aircraft exceed the twenty-two year age limit set by the Aviation Ministry.²³¹ Another important limita-

²²⁰ Kenneth Ehigiator, *The Surest Path to Air Travel Safety in Nigeria, By Experts*, VANGUARD, Nov. 5, 2005.

²²¹ *Id.*

²²² John Nwokocha, *What Next After a Week of Double Tragedy?*, VANGUARD, Nov. 6, 2005.

²²³ Ehigiator, *supra* note 220.

²²⁴ Kenneth Ehigiator, *NCAA Grounds Albarka Airlines, Suspends Fresh Air*, VANGUARD, Dec. 5, 2005.

²²⁵ Ehigiator, *supra* note 220.

²²⁶ Nwokocha, *supra* note 222.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

tion to the improvement of air safety lies in the lack of perimeter fencing at most of Nigeria's airports.²³² An Air France A330-300 aircraft arriving from Paris collided with a herd of cattle that had wandered onto the runway of the Port Harcourt International Airport, which the pilot could not see because there was also a power outage that limited visibility.²³³ The Ministry's temporary response was a new order that any cow or animal seen on a runway was to be shot and that hourly inspections of runways were increased to every thirty minutes, or in the event of night flights, five minutes prior to touchdown.²³⁴ In response and recognition of this problem, the Nigerian government is making efforts to fence all airports by December 2006, which has also been mandated by the ICAO.²³⁵ Only half of the runways in Nigeria are paved.²³⁶ Despite the problems facing the Nigerian aviation industry, it has improved overall in the past decade, and the country remains committed to reaching standards set by the ICAO that will allow them to conduct business with the United States.²³⁷ Nigeria, a contracting state of the ICAO, is currently one of only four African countries in Category II (Two) because of their contributions to global aviation and infrastructure of its airports.²³⁸

In order to breed a culture of aviation safety, countries and international organizations have begun to offer assistance to developing nations. The IATA has stepped in to begin a program evaluating existing aviation systems and training employees on aviation safety guidelines.²³⁹ The IATA partnered with CFM International to begin a fund to start operational training in Africa.²⁴⁰ Another African aviation project comes from the United States Department of Transportation, which operates the "Safe Skies for Africa Initiative."²⁴¹ In 1998, the program was designed and implemented to "promote sustainable improvement in aviation safety and security in Africa, and to create the envi-

²³² Ehigiator, *supra* note 220.

²³³ *Id.*

²³⁴ *The Problems at Our Airports*, THIS DAY, July 24, 2005, available at

²³⁵ *Id.*

²³⁶ CIA – The World Factbook – Nigeria, *supra* note 218.

²³⁷ *The Problems at Our Airports*, *supra* note 234.

²³⁸ *Id.*

²³⁹ Fiorino, *supra* note 211; see IATA, IATA Africa, <http://www.iata.org/worldwide/africa/> (last visited Oct. 23, 2006).

²⁴⁰ IATA Africa, *supra* note 239.

²⁴¹ Federal Aviation Administration [FAA], Safe Skies for Africa, <http://www.faa.gov/asd/international.safeskies.cfm> (last visited Oct. 23, 2006).

ronment necessary to foster the growth of aviation services between Africa and the United States.”²⁴² Nine African countries were selected to participate in the program based upon their overall interest in the program as well as their ability to improve their air safety systems.²⁴³ The nations selected included the following: Angola, Cameroon, Cape Verde, Côte d’Ivoire, Kenya, Mali, Namibia, Tanzania, and Zimbabwe.²⁴⁴ The initial plan for the initiative provided for the United States government to research countries’ aviation needs and assist improving and enhancing their nations’ aviation infrastructure.²⁴⁵ In July 2005, the initiative funded a study for establishing a single flight information region in an effort to unify airspace over Kenya, Tanzania, and Uganda.²⁴⁶ The plan supported a prior recommendation from ICAO that groups of African states should explore forming combined flight information regions.²⁴⁷

C. BLACKLISTED VS. WHITELISTED

One method of effecting change in international airlines is through “blacklists” and conversely “whitelists.”²⁴⁸ The FAA created the International Aviation Safety Assessments (“IASA”) Program to guarantee that all foreign air carriers traveling to and from the United States operate with appropriate licensing and within the safety oversight of a competent Civil Aviation Authority that functions in compliance with ICAO published standards.²⁴⁹ When a foreign air carrier seeks a permit to operate within the United States, the FAA investigates the air carrier’s ability to (1) provide safety credentials and (2) continue oversight of its international carriers.²⁵⁰ The FAA pub-

²⁴² *Id.*

²⁴³ *Id.*; Press Release, U.S. Dep’t of Transp., Secretary Slater Invites Countries to Participate in “Safe Skies for Africa” Initiative (Oct. 30, 1998), *available at* <http://www.dot.gov/affairs/1998/dot19698.htm> (last visited Oct. 23, 2006).

²⁴⁴ Safe Skies for Africa, *supra* note 241.

²⁴⁵ *Id.*

²⁴⁶ Kaminski-Morrow, *African States Study Combined Airspace*, FLIGHT INT’L, July 26, 2005 at 14.

²⁴⁷ *Id.*

²⁴⁸ See David Learmount, *European ‘Blacklists’ Published as Industry Controversy Deepens*, FLIGHT INT’L, Sept. 6, 2005, at 10.

²⁴⁹ FAA, International Aviation Safety Assessments (IASA) Program, http://www.faa.gov/safety/programs_initiatives/oversight/iasa/more/ (last visited Oct. 23, 2006).

²⁵⁰ *Id.*

lishes the compliance or failure of compliance with ICAO safety standards for every country's aviation program.²⁵¹

While many countries publish "blacklists" of air carriers, the IATA urges that the practice does nothing to actually promote air safety.²⁵² The action is purely punitive.²⁵³ However, blacklisting does prevent a carrier from operating in a specific country, damaging their sales and pressuring the carrier to respond by increasing safety. IATA does support the concept of "whitelists," which is also backed by Italy's government.²⁵⁴ Whitelists provide a more classical positive reinforcement method by listing the carriers that are operating at expected safety operational requirements.²⁵⁵

In December of 2005, the EU decided to publish the names of the airlines that are not permitted to operate within its member states.²⁵⁶ In order to develop a comprehensive list, the Member States are required to identify all air carriers that are subject to an operating ban in their territory.²⁵⁷ The Commission of the European Communities will then review the information provided and compare it to common criteria to decide whether to impose an operating ban on the air carriers.²⁵⁸ Included in the criteria the Commission will use to judge airworthiness are the following:

"verified evidence of serious safety deficiencies, if there is a lack of ability and/or willingness to address safety deficiencies or if there is a lack of ability and/or willingness of the authorities responsible for the oversight of an air carrier to address safety deficiencies, to enforce the relevant safety standards or to oversee the aircraft."²⁵⁹

The list will be updated at least every three months to either add members or to remove air carriers that have remedied their

²⁵¹ FAA, FAA FLIGHT STANDARDS SERVICE: INTERNATIONAL AVIATION SAFETY ASSESSMENT (IASA) PROGRAM (2006), http://www.faa.gov/safety/programs_initiatives/oversight/iasa/media/iasaws.pdf.

²⁵² Learmount, *supra* note 248, at 10.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *See id.*

²⁵⁶ Press Release, European Commission, The Council Approves the Creation of a Common Blacklist of Unsafe Air Carriers (Dec. 5, 2005), *available at* <http://europa.eu.int/rapid/pressReleaseAction.do?reference=PRES/05/343>.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

deficiencies.²⁶⁰ The first list published in March 2006 banned ninety-two different carriers, the majority of which were from Africa.²⁶¹

Both the FAA's IASA program and the EC approach serve the same purpose and are accomplished by similar means. The key difference is that the FAA places more reliance on the ICAO standards of safety in flight and its analysis of the individual CAAs adherence to these policies, while the EC deeply analyzes the individual air carriers and does not look at the CAA. The EC's approach reflects their lack of faith in individual CAA and its mission of looking for a unified European sky. Analyzing each air carrier individually with the same standards throughout the EU and not leaving it to Member States to determine the appropriate criteria for safety, can maintain quality and safety assurances. Ultimately, both methods arrive at the same ends of passenger safety.

D. CERTIFICATIONS

One approach to improving air safety is a bottom-up method. When aviation customers demand safety, air carriers are more likely to respond with increased compliance and new efforts to find safety solutions in an effort to gain and maintain market presence.²⁶² The reason the United States has maintained a reputation for safe and reliable air travel is because U.S. customers demand it.²⁶³ Certifications by international organizations are one method of establishing a public impression of safety. Many other international organizations offer similar audits and "seals of approval" that air carriers can seek to gain.²⁶⁴ The Flight Safety Foundation, ECAC, and IATA are examples of organizations providing audits that ultimately provide a level of certifica-

²⁶⁰ *Id.*

²⁶¹ *EU Issues 'Unsafe' Airlines Ban*, BBC NEWS, Mar. 22, 2006, available at <http://news.bbc.co.uk/2/hi/europe/4832648.stm> (noting that "50 carriers from the Democratic Republic of Congo, 14 from Sierra Leone and seven from Swaziland" appeared on the blacklist); Edward Harris, *EU Ban Highlights Trouble in African Skies*, ABC NEWS INT'L, Mar. 18, 2006, available at <http://abcnews.go.com/international/wirestory?id=1770230&CMP=RSSFeeds0312> (quoting EU Transport Commissioner Jacques Barrot's label of 'many of the African planes' as "flying coffins").

²⁶² Jane Engle, *Despite Recent Plane Crashes, Overall Safety Record is Improving; Flying Safely*, THE BALTIMORE SUN, Sept. 25, 2005, at 9R.

²⁶³ *Id.*

²⁶⁴ Flight Safety Foundation Safety Services, *supra* note 182; SAFA, *supra* note 133; IATA Operational Safety Audit, *supra* note 171.

tion for air carriers who pass.²⁶⁵ Recently, the IATA exercised its power of influence and control over the industry by requiring the IATA Operational Safety Audit as a condition of membership.²⁶⁶ While this serves to bolster the importance of their audit system, in theory it will also provide consumers with a method of recognizing safer airlines.²⁶⁷ This move will force airlines in nations with lower safety standards to keep up or risk losing customers who want safe flights.²⁶⁸

E. THE ACTIONS OF A FEW IMPACTING MANY

International aviation authorities and international aviation organizations must look to the future and the continued growth of the aviation industry. While new tools and methods are continually entering the market to make aviation safer, the issue is clearly laying a foundation of a safety culture in countries that are entering the market. Ultimately, everyone is affected by the entrance of new carriers regardless of whether they are permitted to operate in everyone's borders. The loss of human life in a purely preventable accident is deplorable, and countries that have learned the lessons of half a century of flight have much to offer those that are still learning the best methods and developing reasonable operations.

Drastically raising the bar at present poses two eventualities. First, it protects passengers and maintains aviation safety and security. There can be no argument against protecting passengers. Second, it prevents nations that have financial and technological limitations from entering the international aviation market. The result is hindrance to the development of the aviation industry, which can bring in millions of dollars to countries that desperately need an increase in their gross domestic product. This may potentially secure the aviation markets of the United States and the EU as potential oligopolies on international aviation. In order to prevent this unjust balance of power, outreach must be performed and thought to limitations must be given when drafting regulations and international agreements. The EU and the United States already contribute financial resources and have established training based on their exper-

²⁶⁵ Flight Safety Foundation Safety Services, *supra* note 182; SAFA, *supra* note 133; IATA Operational Safety Audit, *supra* note 171.

²⁶⁶ David Learmount, *Self-Regulation Is the Key to Bringing Nations with a Poor Safety Record up to Standard*, FLIGHT INT'L, Jan. 3-9, at 26.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

iences for anyone around the world to learn from. Understandably, the EU and the United States do not want to let carriers in from other countries that do not meet the baseline safety and security necessary to operate within their borders. However, even without an *international* aviation agreement, EU citizens and U.S. citizens will still end up on flights within Africa and within Asia. By helping develop safe and secure aviation practices, the lives of the citizens they are trying to protect domestically will be safe abroad as well. Furthermore, with the increase in international terrorism and the limited governmental operations of Africa, it would be in the best interest of all parties to establish a presence that could aide in deterring terrorist groups from viewing Africa as an easy base of operations.

The United States and the EU continue to grow and develop their aviation industries both domestically and internationally. Addressing the problems that arise falls on the FAA in the United States and EASA in the EU. While the FAA has more independent power as an administrative agency than EASA does, both aim at accomplishing the same goals and both ultimately are successful. Both pull together a group of states. Both act as the final authority on aviation in their governments. Both are subject to review by the courts. Neither model is perfect. The FAA and EASA approach aviation safety as a priority, and both look to the future to develop agreements that provide their passengers with a variety of safe and secure options. With the support and efforts of international organizations such as IATA and ICAO, the global aviation industry will continue to flourish into a safe and secure method of international and domestic transportation.

